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May 16, 2008

Thomasenia P. Duncan  
General Counsel  
Office of the General Counsel  
Federal Election Commission  
999 E Street, NW, 6<sup>th</sup> Floor  
Washington, DC 20463

**Re: MUR 5987, Senator Hillary Clinton, Hillary Clinton for President and Shelly Moskwa, as Treasurer**

Dear Ms. Duncan:

This is the response of our clients, Senator Hillary Clinton, Hillary Clinton for President and Shelly Moskwa, as Treasurer (collectively, the "Committee" or "Respondents") to the complaint filed in Matter Under Review ("MUR") 5987. In short, the complaint, relying on a misrepresentation of statements by the Commission's own spokesperson, is directly contrary to years of clear Commission precedent and wholly fails to recite any facts that would constitute a violation of the law. For the reasons stated below, Respondents respectfully request that the Commission find no reason to believe that any violation of the Federal Election Campaign Act of 1971 (the "Act"), as amended, or the Commission regulations has occurred, dismiss this complaint, and close this MUR as expeditiously as possible.

**I. Background**

At issue in this MUR, is a fundraising event organized by the Committee. The entertainment at the fundraiser consisted of a concert performed by renowned musician Elton John. The fundraiser was held on April 9, 2008 at Radio City Music Hall in New York, New York. The program consisted of remarks by Committee representatives and the candidate followed by the concert.

The Committee organized and handled this event similarly to other fundraisers that it organizes. Invitations to the event were distributed by the Committee prior to the event. Contributions were collected by the Committee prior to the event. In addition, because this event was a "ticketed" event, the Committee contracted with Ticketmaster to assist in the collection of

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certain contributions and the distribution of tickets. The Committee also contracted with the venue, Radio City Music Hall, for the production of the event, through which the Committee paid for the production and related expenses. Finally, the Committee also separately paid for the expenses of the performer, Elton John.

Elton John's participation, however, was questioned in a column in the *Washington Times*, which wrongfully relied on an outdated Commission Advisory Opinion ("AO") and completely misrepresented a statement by the Commission's own spokesperson, Bob Biersack, as well as his subsequent clarification regarding this event. Although clarified by Biersack ("*I did not intend to convey in my conversation with the Washington Times reporter that there is anything unlawful about Elton John performing in a concert to raise money for a U.S. presidential candidate. The Advisory Opinion 2004-26 is clear in the circumstances of the request that foreign nationals may volunteer and may even solicit contributions from non-foreign nationals, provided that they are not soliciting other foreign nationals.*"), the *Times* declined to publish the clarification, resulting in a misleading public record. The Committee made public the above-referenced clarification on the same day as the original erroneous column appeared, but Complainant relied on this misleading and incomplete column, without acknowledging the correction and filed the meritless complaint in this matter.<sup>1</sup>

## II. Discussion

### A. The law, including the Act, Commission regulations and AOs, clearly exempts the value of volunteer services by anyone, including a foreign national, from the definition of contribution.

The Act defines the term "foreign national" as an individual who is not a citizen of the United States and who is not lawfully admitted for permanent residence. 2 U.S.C. §441e(b)(2). The Act prohibits a foreign national from making any contribution of money or other thing of value either directly or through any other person in connection with any Federal, State or local election. 2 U.S.C. §441e(a)(1)(A). However, the Act and Commission regulations also provide that "[t]he term 'contribution' does not include the value of services provided without compensation by *any individual* who volunteers on behalf of a candidate or political committee." 2 U.S.C. §431(8)(B)(i). *See also* 11 CFR 100.74. (emphasis added) As explained below, the term "any individual" has been interpreted by the Commission to include foreign nationals.

In a series of AOs dating back some twenty years and including one as recently as last December, the Commission has addressed the issue of whether uncompensated volunteer services provided by a foreign national constitute a prohibited contribution. In 1987-25, the Commission concluded that a foreign student's work for a campaign without compensation would not result in a contribution, because the value of uncompensated volunteer service is

<sup>1</sup> Complainant was fully aware of – but chose to disregard – this clarifying statement, as it is included in the material attached by Complainant to the complaint. A copy of the Biersack statement is attached hereto as *Exhibit A*. Complainant also disregarded an earlier statement by Biersack that appeared in *The Washington Post* that correctly set out the legal standard. *See* Section II.B below.

specifically exempt from the Act's definition of contribution. See AO 1987-25 at 1. Similarly, in 2004-26, the Commission concluded that a foreign national spouse of a candidate could participate in and perform campaign-related activities, including *by speaking at campaign events or by soliciting funds and support for the campaign*, because such uncompensated activities constituted exempt volunteer activity. See AO 2004-26 at 2.

As recently as December 2007, in AO 2007-22, the Commission reaffirmed these rulings, concluding that the performance of campaign-related activities by Canadian citizens, such as lit drops, door-to-door canvassing, telephone banking and get-out-the-vote activities, without compensation, constitutes volunteer activity, and, as such, is exempt from the Act's coverage. See AO 2007-22 at 3. In this AO, the Commission also explains and distinguishes the sole AO cited by Complainant, 1981-51, when considering the acceptance of goods – in the form of printed election materials – from foreign citizens. Unlike volunteer services, the provision of goods, whether it be a work of art as in 1981-51, or flyers, door hangers or signs as in 2007-22, does constitute a prohibited in-kind contribution, due to the receipt of tangible items not covered by the plain language of the volunteer exception. *Id.* at 6.<sup>2</sup> Services which do not produce tangible goods – even where, as here, provided by a foreign national – are covered by the plain meaning of the volunteer exemption. Thus, the relevant law clearly compels dismissal of the complaint.

**B. Complainant misstates the law, disregards Commission precedent and misquotes the Commission's own spokesperson.**

Complainant completely misstates the law, citing only a single Advisory Opinion, 1981-51, which itself, as indicated above, has been distinguished by the Commission. The Complainant simply fails to cite the other pertinent AOs and dismisses other Commission rulings as applying only to "routine campaign activities, such as stuffing envelopes."<sup>3</sup> Clearly, no such limitation has ever been placed by the Commission on the volunteer exemption. In fact, to the contrary, the Commission has recognized that the volunteer exemption applies to a wide range of participation, including speaking at campaign events and soliciting campaign contributions. Complainant's failure to recognize these other AOs and its dismissal of the Commission's findings is disingenuous and serves no purpose other than to further the filing of a distorted and misleading complaint. The Commission should recognize this as such.

Complainant also relies on a misleading newspaper column that included a misquote of the Commission's own spokesperson. As originally appearing in the *Washington Times*, the column seemingly raised questions about the legality of Elton John volunteering his services by means of a concert and seemed to bolster that question with a quote from Bob Biersack. Although clarified by Biersack ("*I did not intend to convey in my conversation with The Washington Times reporter that there is anything unlawful about Elton John performing in a*

<sup>2</sup> Thus, while the Commission has declined to explicitly overrule 1981-51, it has clearly distinguished the circumstances where the provision of volunteer services does not result in the provision of tangible goods to a candidate.

<sup>3</sup> The material attached by Complainant to the complaint cites to AO 2004-26, even though reference to it was omitted from the complaint itself, and given that that AO sanctioned solicitations by foreign nationals, Complainant's own characterization is blatantly misleading.

concert to raise money for a U.S. presidential candidate. The Advisory Opinion 2004-26 is clear in the circumstances of the request that foreign nationals may volunteer and may even solicit contributions from non-foreign nationals, provided that they are not soliciting other foreign nationals.”), the *Times* declined to publish the clarification, resulting in a misleading public record. The Commission made public the clarification on the same day as the original erroneous column appeared, but Complainant relies on this misleading and incomplete column, without acknowledging the correction.<sup>4</sup>

In addition, Complainant ignores an earlier statement by Biersack – that appeared in a different newspaper, *The Washington Post* – that was truly dispositive of legal issues in this matter, rendering the complaint meritless:

*“Musicians are permitted to donate their time and talents to assist candidates, even when the performers hail from foreign soil, said Bob Biersack, an FEC spokesman.”*

*“If you volunteer your services, then under the regulations that’s not a contribution,” Biersack said.<sup>5</sup>*

Commission regulations at 11 CFR 111.4(d)(3) require that all complaints – in order to be valid – “contain a clear and concise recitation of the facts which describe a violation of a statute or regulation over which the Commission has jurisdiction”. (emphasis added) Complainant fails to meet this standard, and hence, the complaint should be dismissed forthwith. Complainant cites a single incomplete and misleading newspaper column and disregards the Commission’s own clarification of the law. Complainant cites only a single fact in its complaint, i.e., that the “British singer Elton John, a foreign national [will] perform a musical concert on April 9, 2008, at New York City’s Radio City Music Hall.” Given the clear language of the volunteer exemption, as described above, that fact alone does not describe a violation of either the Act or the Commission’s regulations. When coupled with Complainant’s blatant omission of the only relevant AOs, it is indisputable that Complainant has failed to describe a violation of law. Thus, the complaint is invalid, for failing to meet the Commission’s 111.4 requirements, and for this reason alone, the complaint should be dismissed.

**C. By performing at a concert – for which the Committee paid all expenses – Elton John’s activities fall squarely within the volunteer exemption, and no violation has occurred.**

Even if the Commission were to determine that the complaint herein was validly filed, it is clear that in the instant case, Elton John freely volunteered his uncompensated personal services to the Committee, and his activities fit squarely into the permissible activities approved by the Commission in AOs 1987-25, 2004-26, and 2007-22. His volunteer services constituted the performance of a concert at a Committee fundraising event. He provided no tangible goods

<sup>4</sup> As indicated earlier, it is evident that Complainant was fully aware of – but chose to disregard – this statement, as it is included in the material attached by Complainant to the complaint.

<sup>5</sup> “Elton John to Croon for Clinton,” *The Washington Post*, March 17, 2008 ([http://blog.washingtonpost.com/the-trail/2008/03/17/elton\\_john\\_to\\_croon\\_for\\_clinto\\_1.html](http://blog.washingtonpost.com/the-trail/2008/03/17/elton_john_to_croon_for_clinto_1.html)).

to the Committee. His performance is clearly more akin to the volunteer services approved by the Committee in AOs 1987-25, 2004-26, and 2007-22, rather than the original work of art provided in the 1981 AO cited by complainant.

In addition, Elton John did not pay for any expenses in connection with his volunteer services. To the contrary, the Committee paid the expenses for both Elton John and the event itself. The Committee received a bill in advance of the event for expenses for Elton John, and the Committee promptly paid for those expenses, also in advance of the event. In addition, the Committee was billed in advance of the event for the production and event expenses by the venue, Radio City Music Hall, as well as other vendors, and, as with the expenses for Elton John, promptly paid for those expenses, also in advance of the event. The Committee paid in excess of \$278,329 for the costs of the event, which, to the best of the Committee's knowledge is a far higher amount than the Committee paid for any other fundraising event held during the campaign.<sup>6</sup> These expenses, which are itemized in detail and attached as *Exhibit B* hereto, included expenses for Elton John,<sup>7</sup> event site rental and other production and staging costs, such as sound and lighting, equipment rental, including the transport of instruments, printing, security, catering, insurance, building services, licensing fees, and a five percent (5%) contingency for other expenses.<sup>8</sup>

The Committee has also attached copies of the pertinent payment checks to this response as part of *Exhibit B*. All of these payments have appeared or will appear on the Committee's applicable monthly FEC report for the month when the payments were made.

Thus, to the best of the Committee's knowledge, Elton John did not pay for any expenses related to his performance. The Committee did not receive "anything of value" that would constitute a contribution under the definition of 2 U.S.C. §431(8)(A)(i), but, in fact, received only volunteer services exempt under 2 U.S.C. §431(8)(B)(i). The simple fact that Elton John, a British national, volunteered to play a concert at a Committee event, does not give rise to any violation of law. Accordingly, the Commission should find no reason to believe that any of the Respondents violated any provision of the Act or Commission regulations and close this matter forthwith.

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<sup>6</sup> This amount excludes the fee of \$46,389 paid to Ticketmaster for their services in ticket distribution and brings the total for the event to \$324,718. Committee fundraisers with a venue rental typically cost no more than \$15,000, and even the Committee's large scale public events run approximately \$50,000 in cost.

<sup>7</sup> Elton John's expenses were paid directly to his wholly-owned domestic corporation, J. Bondi, Inc., which the Committee understands was organized to receive income in the U.S. from his concert and other appearances and other U.S. income producing endeavors.

<sup>8</sup> See also, *Exhibit C*, Affidavit of Shelly Moskwa, Treasurer.

### **III. Conclusion**

In conclusion, the complaint in this matter is wholly without merit, relying on an incomplete reference to Commission AOs, while disregarding the statute, Commission regulations and Commission advisories under which the activity in question would be considered clearly permissible. The Committee received volunteer services from Elton John and nothing more. For that reason, the Respondents respectfully request that the Commission find no reason to believe that the Respondents violated any provisions of the Act or Commission regulations and close this matter as expeditiously as possible.

Respectfully submitted,

*Lyn Utrecht*  
Lyn Utrecht

*Eric Kleinfeld*  
Eric Kleinfeld

**Exhibits**

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**EXHIBIT A**

## THE FACT HUB

**PEC Spokesman Confirms There Was Nothing Unlawful About Elton John Performance**

3/27/2008 11:43:45 AM

Recent news reports mistakenly suggest Hillary broke the law by allowing Elton John, a foreign national, to perform for her campaign.

Hillary's campaign has complied with the law. Since 1997, the FEC has consistently held that foreign nationals may volunteer their time for campaigns on an uncompensated basis. Elton John is simply volunteering his uncompensated time to appear at the concert. This appearance is consistent with past FEC rulings.

Bob Barrett, FEC Spokesman confirmed that there was nothing unlawful about the Elton John performance:

*"I did not intend to convey in my conversation with the Washington Times reporter that there is anything unlawful about Elton John performing in a concert to raise money for a US presidential candidate. The Advisory Opinion 2004-26 is clear on the circumstances of the request that foreign nationals may volunteer and may even solicit contributions from non-foreign nationals, provided they are not soliciting other foreign nationals."*

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